

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

PEDRO PALTEP,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

Case No. DISM-00-0050

ORDER GRANTING APPELLANT'S
MOTION TO EXCLUDE EVIDENCE OF
ALLEGED PRIOR MISCONDUCT

I. INTRODUCTION

1.1 Hearing on Motion. This matter came before the Personnel Appeals Board, GERLAD L. MORGEN, Vice Chair, and LEANA D. LAMB, Member, on March 26, 2001, for hearing oral argument on Appellant's Motion to Exclude Evidence of Alleged Prior Misconduct. The hearing was held in the Personnel Appeals Board Hearing Room, 2828 Capitol Boulevard, Olympia, Washington.

1.2 Appearances. Appellant Pedro Paltep was represented by Christopher Michael Davis, Attorney at Law. Jeffrey W. Davis, Assistant Attorney General, represented Respondent University of Washington.

1.3 Documents Considered. The Board considered the file and documents in this matter, including:

- (a) Appellant's Memorandum in Support of Motion to Exclude Evidence of Alleged Prior Misconduct, filed March 19, 2001;
- (b) Brief of Respondent University of Washington in Support of Admissibility of Testimony, filed March 19, 2001;

II. BACKGROUND

2.1 By letter dated June 28, 2000, Appellant was terminated from his job as a Lead Custodian with the University of Washington, Custodial Services Division of Facilities Services, effective July 14, 2000. In its letter of termination, Respondent alleged that Appellant sexually harassed Mulu Sium, a female custodian. On July 12, 2000, Appellant filed an appeal of his dismissal.

2.2 During witness preparation on February 21, 2001, Theresa Moore, also a Custodian with Custodial Services Division, reported to counsel for Respondent allegations that Appellant made sexual advances towards her. This was the first time Ms. Moore made these allegations. On February 22, 2001, Respondent disclosed Ms. Moore's accusations to Appellant's counsel for the first time.

2.3 On February 23, 2001, the hearing was convened. During opening arguments, Appellant objected to any new testimony or new accusations against Appellant from witness Theresa Moore. Appellant argued that any new allegations not divulged by a witness during the initial investigation would be prejudicial to his appeal.

2.4 Respondent argued that it was not until February 23, during last minute witness preparation that it became aware of Ms. Moore's allegations. Respondent argued that it should be allowed to present new testimony from Ms. Moore to show that Appellant engaged in a "common plan or scheme" to sexually assault and harass other female custodians.

1 2.5 The Board orally ruled that the only evidence and testimony it would allow during the
2 hearing were facts and information known to the appointing authority at the time she made the
3 determination to terminate Appellant. The Board stated that allegations that were discovered after
4 Appellant's termination that substantiated that decision would not be considered by the Board.

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6 2.6 Respondent asked the Board to reconsider its ruling and argued that Ms. Moore's testimony
7 was admissible under Evidence Rule 404(b).

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9 2.7 The Board directed the parties to submit briefs regarding the admission of Ms. Moore's
10 testimony and to hold oral argument on the issue on March 26, 2001.

11 **III. ARGUMENTS OF THE PARTIES**

12 3.1 Appellant argues that pursuant to Evidence Rule 404(b), evidence of prior wrongs or bad
13 acts is not admissible to prove the character of the person charged with the current offense and may
14 only be admissible in certain limited circumstances. Appellant argues that Ms. Moore's testimony
15 should be excluded because Respondent has not made any showing that her new testimony
16 demonstrated that Appellant engaged in unique or sufficiently uncommon conduct showing that he
17 had a plan to sexually harass or assault women. Appellant asserts that the allegation of prior sexual
18 harassment, standing alone, does not give rise to the "common plan" requirement that is necessary
19 before evidence of the allegation may be admitted. Appellant asserts that the only commonality
20 demonstrated between Ms. Moore and Ms. Sium is that both are female and both were colleagues of
21 Appellant and that both alleged that Appellant engaged in unwanted touching. Appellant argues
22 that Ms. Moore's new testimony fails to show that he engaged in a unique or common plan to
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1 harass or assault women and that her testimony must be excluded from the Board's consideration as
2 irrelevant and prejudicial.

3 3.2 Respondent argues that after-acquired evidence is admissible and that there is no policy
4 reason to keep out this evidence. Respondent argues that Ms. Moore's testimony is relevant in
5 showing a common scheme or plan. In support of its argument, Respondent cited to *State v.*
6 *Griswold* and *State v. Lough*. Respondent argued that these two cases supported the admission of
7 Ms. Moore's new testimony to show that Appellant's alleged conduct against Ms. Sium was part of
8 a common scheme or plan and that Ms. Moore was subjected to the same type of behavior as Ms.
9 Sium. Respondent argues that both Ms. Moore and Ms. Sium were coworkers in lower level jobs
10 than Appellant's, both were vulnerable, both were subjected to similar escalating touching in the
11 exact same work area (D wing).
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14 IV. DISCUSSION

15 4.1 The question presented for the Board to resolve is whether to allow the testimony of a
16 witness who, two days prior to the hearing, disclosed allegations that Appellant sexually harassed
17 her.
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19 4.2 Evidence Rule 404(b) states that

20 Evidence of other crimes, wrongs, or acts is not admissible to prove the character
21 of a person in order to show action in conformity therewith. It may, however, be
22 admissible for other purposes, such proof of motive, opportunity, intent,
23 preparation, plan, knowledge, identity or absence of mistake or accident.

24 4.3 The Board looks to the civil rules for procedural guidance in employee appeals. However,
25 the Board does not slavishly adhere to every aspect of the civil rules as they have been interpreted
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1 by the courts. Rather, the Board provides a forum and due process for a fair and complete hearing
2 of employee appeals to carry out its statutory obligations under chapter 41.64 RCW. Hearings are
3 “informal with technical rules of evidence not applying to the proceedings except the rules of
4 privilege recognized by law.” RCW 41.64.110 (McSherry v. Dep’t. of Corrections, PAB No.
5 DEMO-97-0005 (1999).

6
7 4.4 In support of its argument, Respondent relies heavily on *State v. Griswold*, 98 Wn.App. 817
8 (2000) and *State v. Lough*, 125 Wn.2d 847 (1995). These cases involve crimes of rape and the
9 molestation of a child. While the need to admit evidence of prior allegations in these cases may be
10 great given the nature of these alleged crimes, the proceedings before this Board are administrative
11 and not criminal proceedings.

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13 4.5 As a practice, this Board has routinely limited evidence and testimony during hearings to the
14 same evidence before the appointing authority when he or she undertook the disciplinary action.
15 While we have allowed testimony taken during depositions to be presented for impeachment
16 purposes, we continue to hold that evidence and allegations not known to the appointing authority
17 and which were not a part of his/her decision-making process will not become a part of the record
18 before us.

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20 4.6 In this case, during witness interviews on February 21, 2001, Ms. Moore revealed
21 allegations that Appellant sexually harassed her. Appellant’s alleged acts of sexual harassment
22 occurred only months before the acts which Appellant purportedly committed with Ms. Sium. The
23 allegations were not revealed during the University’s investigation even though Ms. Moore was a
24 part of the investigation. Additionally, the allegations were not known to the appointing authority
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1 at the time she made the determination to terminate Appellant. Moreover, these allegations have
2 not been investigated and, based on prior Board determinations, this Board will not hold “a hearing
3 within a hearing” to determine the veracity of Ms. Moore’s allegations. Finally, the possible
4 prejudice to Appellant outweighs the possible prejudice to Respondent. Therefore, Appellant’s
5 motion to exclude Ms. Moore’s recently disclosed allegations is granted, and her testimony is
6 limited to her knowledge related to events surrounding Ms. Sium’s allegations.
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8 4.7 Having reviewed the files and records in this matter and being fully advised in the premises,
9 the Board enters the following:
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11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that Appellant’s Motion to Exclude Evidence of
13 Alleged Prior Misconduct is granted, and Ms. Moore’s testimony is limited to her knowledge
14 related to the events for which Appellant was terminated.
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16 DATED this _____ day of _____, 2001.
17

18 WASHINGTON STATE PERSONNEL APPEALS BOARD
19

20 _____
Gerald L. Morgen, Vice Chair
21

22 _____
Leana D. Lamb, Member
23
24
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Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504